

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GUADALUPE MARINO

Claimant

VS.

EXCEL CORPORATION

Respondent

Self-insured

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Docket No. 259,590

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Pamela J. Fuller's June 11, 2002, Decision. The Appeals Board placed this case on its summary calendar for decision without oral argument.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared on behalf of the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared on behalf of the self-insured respondent.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant had suffered a 6 percent permanent partial general disability based on permanent functional impairment. Claimant appeals and requests the Board to modify the 6 percent award and find claimant is entitled to an 11 percent permanent partial general disability.

In contrast, respondent requests the Board to affirm the Award.

Thus, nature and extent of claimant's resulting disability is the only issue for Board review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and the parties' arguments, the Board makes the following findings and conclusions:

This is a claim for bilateral upper extremity injuries claimant suffered while employed by respondent at its meat packing plant. The parties stipulated to a date of accident of March 25, 2000. Claimant started working for the respondent in August of 1996. Claimant's testimony and the medical reports of the two evaluating physicians indicate that claimant started having symptoms in her left shoulder sometime in March of 2000.

Claimant received conservative treatment for her pain and discomfort in her bilateral upper extremities including her shoulders through respondent's company physician Dr. Villanueva. Most of the treatment that claimant received was at respondent's plant health facility. Dr. Villanueva had claimant undergo physical therapy and placed her on medications. But claimant's treatment was suspended in September 2000 because of her pregnancy. Claimant delivered her baby in December 2000.

In February 2001, because her pain and discomfort had not gone away during her pregnancy, claimant returned to see Dr. Villanueva. Dr. Villanueva again had claimant undergo physical therapy. The doctor released claimant to return to work in March 2001. At the April 4, 2002, preliminary hearing, claimant had been working since May 14, 2001, with knives in a job entitled defect trimmer.

During the regular hearing, claimant described that she had continuing pain and discomfort in her upper extremities and shoulders that increased with physical activities at home or at work. But claimant also testified that she was able to attend work for respondent on a daily basis, working 8 hours per day and 5 days per week. Moreover, claimant was earning a post-injury wage that exceeded her stipulated pre-injury wage of \$462.72 per week. Thus, work disability is not an issue and claimant's entitlement to permanent partial general disability benefits has to be determined based on claimant's permanent functional impairment.¹

Two physicians examined and evaluated claimant and expressed their opinions on claimant's permanent partial impairment as a result of her March 25, 2000, work-related accident. At claimant's attorney's request, Pedro A. Murati, M.D., board certified in rehabilitation and physical medicine, examined claimant on April 24, 2001. He found claimant with complaints of pain across both shoulders, left more than right. Claimant also complained of pain in both upper extremities and numbness in her right thumb and right index finger. The doctor diagnosed claimant with probable bilateral carpal tunnel syndrome, (2) myofascial pain syndrome of bilateral shoulders, and (3) symptomatic flexor nodules noted at the right third and fourth digits. Dr. Murati attributed all the diagnoses as the direct result of claimant's work activities while employed by respondent.

¹ See K.S.A. 1999 Supp. 44-510e(a).

Dr. Murati determined claimant had a left upper extremity functional impairment of 12 percent which converted to a 7 percent whole body impairment. He determined that claimant had a 17 percent right upper extremity impairment which converted to a 10 percent whole body impairment. Those two whole body impairments combine for a 16 percent whole body permanent functional impairment rating.

The parties entered into a stipulated order filed on July 23, 2001, for C. Reiff Brown, M.D., to be appointed to perform an independent medical evaluation of claimant to determine the extent of the permanent functional impairment she had suffered as a result of the March 25, 2000, work-related accident.

On October 16, 2001, some 7 months after claimant returned to work, retired orthopedic surgeon Dr. Brown performed an independent medical evaluation of claimant. He found claimant with complaints of pain in both shoulders; weakness in both upper extremities; pain, tingling, and numbness in her index finger and thumb of the right hand; and right severe lateral humeral epicondylitis. Dr. Brown diagnosed claimant with bilateral rotator cuff tendinitis and right lateral humeral epicondylitis. For the bilateral rotator cuff tendinitis, which resulted in mild loss of range of motion in the shoulders, he assessed a 3 percent permanent impairment for each upper extremity. In regard to the right lateral humeral epicondylitis, he assessed a 3 percent functional impairment. The doctor combined the two 3 percent right upper extremity impairments for a 6 percent upper extremity impairment. The 6 percent right upper extremity impairment and the 3 percent left upper extremity impairment were converted to whole body impairments and then combined for a 6 percent whole body functional impairment rating.

The ALJ found Dr. Brown's 6 percent permanent functional impairment rating the most reliable, reasoning the examination was an independent examination and the most recent examination. Claimant argues both physician opinions are equally reliable and credible and should be given equal weight in determining claimant's permanent partial general disability resulting in an 11 percent award.

After reviewing both physicians' examinations and their permanent functional impairment opinions, the Board finds that the principal difference in the two opinions is the diagnosis made by Dr. Murati that claimant probably has bilateral carpal tunnel syndrome. As explained by Dr. Murati, he is more than 51 percent convinced that claimant has bilateral carpal tunnel syndrome.² Dr. Murati assigned claimant a 10 percent impairment for each upper extremity for the carpal tunnel syndrome.

In contrast, Dr. Brown's clinical testing was negative for carpal tunnel syndrome and he, therefore, assigned no impairment for that condition. Claimant had not undergone any nerve conduction/EMG testing to otherwise objectively diagnose carpal tunnel syndrome.

² Murati Depo. at 5.

The Board agrees with the ALJ, that in this case, the more persuasive medical opinion concerning claimant's residual permanent functional impairment resulting from her work-related accident is that of orthopedic surgeon Dr. Brown. The Board finds significant that, although claimant continued to have complaints of pain and discomfort, at the regular hearing, she remained able to successfully perform work for respondent utilizing her upper extremities without any evidence of loss of work for over a year since she returned to work in March of 2001. In addition to finding that claimant had negative Tinel and Phalen's signs for carpal tunnel syndrome, Dr. Brown also pointed out that he found claimant's thenar muscles (muscles around the base of the thumb) and her hypothenar muscles (muscles around the little finger), which are muscles served by the median nerve, were not atrophied. Dr. Brown opined, with advanced carpal tunnel syndrome, it would be common to observe atrophy.³

Based on Dr. Brown's persuasive opinion and claimant's testimony that she continues to be able to effectively use her upper extremities while working for the respondent, the Board is convinced that Dr. Brown's 6 percent rating best represents claimant's resulting permanent partial general disability.

In conclusion, the Board further agrees with the findings and conclusions of law that are set forth in the Decision. It is not necessary to repeat those findings and conclusions of law in this Order. Thus, the Board adopts those findings and conclusions as its own as if specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Pamela J. Fuller's June 11, 2002, Decision, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

³ Brown Depo. at 7.

c: Chris A. Clements, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation